No. 91-1943 (2)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BRUNNER & LAY, INC., ROBERT M. WILKINSON, AND BOBBY AND GEORGIA MCLAUGHLIN ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS, ... *Petitioners,*

VS.

JIM C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIELOU FISHER, TREASURER OF THE STATE OF ARKANSAS; JOAN R. PERRY, TREASURER OF WASHINGTON COUNTY; AND CHARLES A. JOHNSON, COUNTY JUDGE OF WASHINGTON COUNTY, ARKANSAS,..... *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Respondents respectfully request that this Court deny Petitioners' petition for writ of certiorari seeking review of the opinion of the Arkansas Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT.

Since 1977, the question of whether a state tax violates the Commerce Clause has been determined by applying the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A tax survives a Commerce Clause challenge if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279.[1]

The only real issue before the Arkansas Supreme Court was the application of the third prong of *Complete Auto* to Arkansas' sales and use tax on used vehicles, airplanes, and mobile homes. The Arkansas Supreme Court found the first and fourth prongs satisfied and noted that the Petitioners did not argue that there were insufficient contacts with Arkansas. The court also determined that the second prong was met citing *D. H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24 (1988) for the proposition that when credit for sales tax paid to another state on a purchase is applied against use tax assessed on the same purchase, the use tax is fairly apportioned. *See* (Pet. App. A at 15a.)

The questions presented by Petitioners focus only on whether Arkansas' sales and use tax scheme discriminates, either facially or in practical effect, against interstate

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[1]This test was most recently applied in *Quill Corp. v. North Dakota*, 60 U.S.L.W. 4423 (U.S. May 26, 1992).

commerce. While there is no model case in the "quagmire"[2] of Commerce Clause opinions, a basic tenet is that a state may not impose "a heavier tax burden on out-of-state business that competes in an interstate market than it imposes on its own residents who also engage in commerce among states." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987).

A. *Facial Discrimination*

A statute is facially discriminatory when there is an "explicit discriminatory design to the tax"[3] or when by its terms it treats unequally people inside and outside of the state.[4] Petitioners undermine their facial discrimination claim by agreeing that the "statute does not by its terms favor the Arkansas over the out-of-state purchase." (Pet. at 11.)

The recent cases cited by Petitioners in support of facial discrimination (Pet. at 9-10) concern statutes which conferred a tax benefit based either on the source of the goods[5] or the site of the taxpayer's activities.[6] None of these cases conflicts with the Arkansas Supreme Court's conclusion that the challenged exemptions were valid because they "did *not*

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[2]*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[3]*Amerada Hess v. New Jersey Taxation Div.*, 490 U.S. 66, n.6 (1989).

[4]Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986).

[5]*New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *Bacchus* is not a "facial discrimination" case but a "discriminatory intent" case. *Amerada Hess*, 490 U.S. at 76.

[6]*Tyler Pipe Indus., Inc. v. Washington St. Dept. of Rev.*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

depend on the residency of either the seller or the buyer, or on the location, in or out of this state, of the sale or purchase transaction." (Pet. App. A at 15a.) Clearly, the Arkansas statutes treated in-state purchases of used goods equally with out-of-state purchases with the tax burden in both cases being borne by the Arkansas resident.[7]

Recent Commerce Clause cases generally focus on the facts of the taxpayer's taxable activity and whether the same activity, if undertaken by another person, is taxed differently because of some "interstate element." *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977) and cases cited herein at note 4. The Arkansas sales and use tax scheme exempted the sale or purchase of used vehicles, airplanes, and mobile homes previously taxed by Arkansas. The narrow question in this case is whether the used item's sale history has any relevance in a Commerce Clause analysis. Petitioners have failed to cite any case which even by the most liberal analogy would extend Commerce Clause protection based on the *past* relationship of the used item with interstate commerce.

Previous decisions of this Court establish that neither the past commercial history[8] nor the post-sale destination of goods[9] is relevant in determining whether a sales or use tax on

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[7]This Court has suggested that tax burdens falling on resident taxpayers may not come within Commerce Clause protection. *Goldberg v. Sweet*, 488 U.S. 252 (1989); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

[8]*McGoldrick v. Berwind-White Coal Min. Co.*, 309 U.S. 33 (1940). Sales tax on coal shipped from outside the state into New York did not burden interstate commerce.

[9]*Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). A state severance tax on coal did not discriminate against commerce even though 90% of the coal was shipped out of state for use by non-residents. The tax was calculated at the same rate regardless of the final destination.

sales of those goods is a burden on interstate commerce.

> This Court has indicated that states have considerable latitude in imposing general revenue taxes. . . . There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce, particularly when the tax is levied on an activity conducted within the state. . . . *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-623 (1981).

B. *Discrimination by Practical Effect*

The foundation of Petitioners' "practical effect" discrimination claim rests on a mischaracterization of the record. There is no evidence to establish that, in the "overwhelming majority of cases," used goods purchased in Arkansas will be exempt on subsequent sale and used items purchased out of state will be taxable. (Pet. at 12.) In reality, families frequently move among the states bringing their used goods with them.[10] Car dealers commonly buy used vehicles from out-of-state wholesalers. Multistate businesses dispose of used vehicles and aircraft. In all of these cases non-exempt used goods may become inventory for an Arkansas seller.

Petitioners rely on the "drummer" cases[11] to overcome

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[10]As certified, the class of taxpayers encompasses those who purchased used vehicles, mobile homes, and airplanes between September, 1986 and April 30, 1991. (The repeal of the challenged exemptions was effective May 1, 1991.) Between 1985 and 1990, 252,836 people (aged 5 years and over) moved from another state to Arkansas. U.S. Department of Commerce, Bureau of Census, Press Release No. CB92-39, 1990 CPH-L-80, Table 1 (May 27, 1992).

[11]Pet. at 12; *See Nippert v. Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940).

the effect of a bare record. These cases established that a license fee imposed on itinerant salespeople impermissibly burdened interstate commerce. The heavier tax burden "encourages an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 374 U.S. 858, n.4 (1963), citing cases contained in *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U.S. 389 (1952). Without any factual basis, Petitioners' assumption cannot be supported by the drummer cases, as even *Nippert*, 327 U.S. 416, is based on an evidentiary record.[12] "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." 327 U.S. at 431.

In comparison, *Scheiner*, 483 U.S. 266[13] focused on the *actual* practical effect the Pennsylvania flat tax had on non-resident truckers. The record established that the tax imposed on non-resident truckers was approximately five times as heavy as the cost per mile of local truckers. The effect of the tax was that it favored local business "for no other reason than the location of its business." *Id.* at 286. Unlike *Scheiner*, there is no record here from which the actual practical effect of Arkansas' tax scheme may be analyzed.

In *Amerada Hess v. New Jersey Taxation Div.*, 490 U.S. 66 (1989) this Court determined that New Jersey's add-back provision did not discriminate against interstate commerce and did not exert any pressure on interstate business to

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[12]Ms. Nippert had been in Richmond only five days. There was no indication that she regularly worked in the Richmond area. The license fee was applied to her and others who might only enter Richmond occasionally without regard to business volume or time spent in Richmond. It could be said that the tax was discriminatory because it was also unfairly apportioned.

[13]*Scheiner* is cited in *Amerada Hess*, 490 U.S. at 76 as an example of a state tax which in practical effect discriminates against commerce.

relocate to New Jersey. The Court noted:

> Indeed, precisely because the deduction denial results in a larger New Jersey tax for appellants, it creates some incentive for appellants to move their operations out of that state. Thus, in the absence of discriminatory intent or a statute directed specifically at economic activity that occurs only in a particular location (as in *Bacchus Imports*), a deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing state. *Id.* at 78 n.10.

It has been suggested that unless a negative effect on interstate commerce is established, state statutes which create tax incentives for in-state activities and which do not penalize out-of-state activities do not discriminate against commerce.[14]

Petitioners rely heavily on *Halliburton*, 374 U.S. 858, as the controlling case in "conflict" with the Arkansas Supreme Court. Part of *Halliburton* dealt with the application of Louisiana's use tax to the taxpayer's purchase of used goods in a casual or isolated sale. Louisiana's isolated sale exemption applied to in-state sales but not out-of-state sales. The different tax treatment was dependent *only* on the location of the sale and departed from the rule of equality of *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).[15] Since Arkansas' tax scheme is not dependent on the location of the sale, *Halliburton* is not applicable.

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[14]Phillip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879 (1986).

[15]"Equality is the theme that runs through all the sections of the statute. . . . When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." 300 U.S. at 583-584.

C. *Avoidance of Sequential Taxation*

Petitioners criticize the Arkansas Supreme Court for noting that the "principal object" of Arkansas' tax scheme was to tax only one sale of a vehicle, mobile home, or airplane. (Pet. at 14.) The purpose of the court's comment was to distinguish the present case from *Halliburton* and was not necessarily a basis for upholding the statute against the Commerce Clause challenge. Nevertheless, as this Court noted in *Halliburton*, 374 U.S. 858 n.8:

> The appellee argues that the reason for the exemption is that any item sold in a local isolated sale has already been subjected to either a sales tax if it was originally acquired in Louisiana or a use tax if it was imported, whereas there is no assurance that an item acquired in an out-of-state isolated sale has ever sustained such a tax burden. The appellee further maintains that the taxes here in question could have been reduced by any such previous taxation. *If the record supported the appellee's position, it would be carefully considered.* (emphasis added)

Such a record exists in this case.

D. *Necessity of a Use Tax Credit is Irrelevant.*

Arkansas allows a use tax credit against sales tax paid on a particular purchase.[16] The issue of whether the credit is constitutionally necessary was not before the Arkansas Supreme Court[17] and is not present here.

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[16]Ark. Code Ann. §26-5-101(v) (Michie 1987).

[17]The court speculated that a tax scheme which allowed no use tax credit would be a greater burden on commerce than Arkansas' tax exemption and credit scheme. (Pet. App. A at 16a-17a.)

E. *Arkansas' Tax Scheme is Internally Consistent.*

Although Petitioners' questions presented do not encompass the second prong (fairly apportioned tax)[18] of the *Complete Auto* test, Petitioners assert that Arkansas' tax scheme is not internally consistent. (Pet. at 13 n.11.) Petitioners state that if every state adopted Arkansas' former tax scheme, then used property remaining in a state would be taxed only once while used property purchased out of state would "frequently bear a double tax burden." This interpretation of internal consistency treats Arkansas' tax scheme as a property tax instead of a transactional tax. Provided that a particular transaction is not taxed more than once, there is no risk of multiple taxation and the tax is internally consistent.[19]

II.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT POSE A THREAT TO THE NATIONAL ECONOMY.

The questions presented by Petitioners address the application of well-established Commerce Clause principles to Arkansas' sales and use tax scheme. Allowing the decision of the Arkansas Supreme Court to stand would not disrupt

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[18]The "internal consistency" test originating in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983), is part of determining whether a tax is fairly apportioned. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989); Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on Taxation*, 87 Mich. L. Rev. 138 (1988). A tax is fairly apportioned when there is limited or no risk of multiple taxation on the same transaction. *Goldberg*, 488 U.S. at 261. If all states exempted previously taxed used goods *and* granted a use tax credit, no state would tax a particular sales transaction more than once.

[19]*Goldberg, supra*, note 18; *D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988).

those principles or affect non-litigants.[20] In support of the asserted national importance of this case, Petitioners reference sales and use tax exemption statutes from other states which, in some fashion, exempt previously taxed used mobile homes and vehicles. (Pet. at 17 n.13-14.) There are only three states whose sales and use tax exemption statutes for used mobile homes are nearly identical to Arkansas'.[21] The rest of the statutes are significantly different.[22]

Petitioners also point to a number of state income tax

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[20]Reversal of the Arkansas Supreme Court would require that court to decide issues it initially declined to address which include: 1) whether the named class representatives have standing; 2) whether the class of taxpayers was properly certified; and 3) whether a tax refund is required under the *Chevron* analysis.

[21]Wyoming and Washington exempt a previously taxed mobile home only if it has become a fixture or improvement to real estate. The effect is that Wyoming and Washington would tax all subsequent sales of used homes which retained the character of tangible personal property. Nevada and Colorado initially tax only a portion of the gross receipts of new manufactured or mobile homes and then exempt subsequent sales. Minnesota taxes all sales of new and used manufactured homes used for commercial purposes; taxes only a portion of the sales price of new manufactured homes used for residential purposes; exempts subsequent sales of used residential manufactured homes; and taxes all sales of mobile homes which do not meet the definition of "manufactured home." Admittedly, the statutes of North Dakota, New Mexico, and Iowa are fairly similar to Arkansas' statutes relating to mobile homes.

The used vehicle exemptions of Connecticut and Michigan are much narrower than Arkansas' statutes. Both states exempt from sales and use tax the transfer of a previously taxed vehicle as the result of a reorganization, organization, or liquidation of a corporation or partnership. All other sales of used vehicles are taxable.

The California vehicle valuation statute appears to be problematic as it imposes a higher tax rate on vehicles purchased from out-of-state sellers than those purchased from in-state sellers. Florida grants a sales or use tax credit against its impact fee on title applications of out-of-state titled vehicles.

[22]*See supra* note 21.

statutes which appear to condition exemptions on the taxpayer's in-state activities. (Pet. at 18 n.17-18.) Petitioners have cited no state court decisions determining the constitutionality of any of these statutes, other than California's valuation statute. (Pet. at 18 n.15.) There appears to be no conflict among these states and this Court requiring resolution.

The effect of reversing the Arkansas Supreme Court would not, as Petitioners state, keep state legislatures from passing burdensome legislation. A reversal would represent a major extension of Commerce Clause protection from accepted interstate elements of residency, geographic location, and source of goods to non-situs factors and could open the door for challenges to many other types of state statutes which have been presumed constitutional in light of past Commerce Clause jurisprudence. One group of statutes offers tax incentives which encourage local economic activity but do not depend on the taxpayer's out-of-state activity.[23] Such a ruling would create grave uncertainty among the states at a time when bolstering local economies is necessary to keep many states financially afloat.

The decision of the Arkansas Supreme Court is neither erroneous nor in conflict with established constitutional principles. Allowing the decision to stand will have no effect on taxing schemes of Arkansas or any other state.

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[23]Tatarowicz, *supra* note 14, at 931 n. 255-258. Such tax incentives include job credits, investment credits, and research credits intended to encourage businesses to locate within the state.

CONCLUSION

For the reasons stated above, this Court should deny Petitioners' petition for writ of certiorari filed herein.

Respectfully submitted,

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